Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

No. 76-2 [illegible]

R. L. GRIFFIN, MAURICE LAMPE, and
ELBERT GRIFFIN,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

CHARLES NESBITT
620 Cravens Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

July, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to the Temporary Emergency Court of Appeals of the United States to review the opinion and judgment entered in these proceedings on June 8, 1976.

Pursuant to Rule 23, Petitioners show the Court:

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States (TECA herein) is as yet unreported, and appears as Appendix I. The opinion of the United States District Court for the Eastern District of Oklahoma is unreported, and appears as Appendix II.

JURISDICTION

(i) The judgment of the TECA was dated June 8, 1976, and entered the same day. This petition was filed within 30 days after entry thereof.

(ii) No rehearing was sought. There has been no order extending time to petition for certiorari.

(iii) Jurisdiction to review the judgment by certiorari is granted by Section 211 (g) of the Economic Stabilization Act of 1970, as amended (12 U.S.C.A. 1904 note, P.L. 92-210, 85 Stat. 743, incorporated by reference into the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627, 15 U.S.C. 754).

QUESTIONS PRESENTED FOR REVIEW

(1) Is the Tucker Act available as a remedy to owners of property who claim that their private property was taken by the United States as a result of federal regulatory action in the form of price controls selectively imposed on some but not all sales of crude oil, under terms of which Petitioners were forced to sell their oil at a price approximately 37% of the lawful sales price of the same oil sold by others under similar conditions?

(2) Are Petitioners entitled to a trial on the merits, in a Tucker Act case, of the issue of fact whether the federally mandated two-tier crude oil price control scheme resulted in a taking of their property for which the Constitution guarantees just compensation?

(3) Is the question whether federal crude oil price controls result in a taking of Petitioners' private property

a "substantial constitutional question" involving the constitutional validity of the law or regulations which is appropriate for certification to and within the jurisdiction of the TECA pursuant to Section 211 (c) of the Economic Stabilization Act of 1970 as amended?

(4) May the TECA lawfully decide in the abstract that federal regulatory action in the form of a two-tier crude oil price control scheme does not constitute a taking of private property; and thus deny Petitioners the opportunity to make their proof on the question as an issue of fact properly raised in a Tucker Act case?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions appear as Appendix III.

STATEMENT OF THE CASE

Petitioners filed separate actions, later consolidated, against the United States in the United States District Court for the Eastern District of Oklahoma. Jurisdiction was founded upon the Tucker Act (28 U.S.C. §1346 (a) (2)); and in two of the cases seeking more than $10,000, the provisions of §210 (a) of the Economic Stabilization Act of 1970 (See Appendix III) vesting jurisdiction in the District Courts of cases arising thereunder without regard to amount in controversy.

These are simple Tucker Act cases in which plaintiffs allege that federal regulatory action in the form of price

controls imposed on the sale of their crude oil has resulted in a partial taking of their property by the United States by physical appropriation, for which the Constitution, Amendment V, guarantees them just compensation.

Petitioners are non-operating (royalty) owners of part of the production from certain oil wells in Marshall County, Oklahoma. Each Petitioner alleged that by reason of the two-tier scheme he had been prohibited from selling his oil at a price above $5.25 per barrel while at the same time the crude oil produced from nearby leases, and elsewhere in Oklahoma and the United States, was permitted to be sold at the free market price of up to $14.00 per barrel. Each further alleged that but for this price control he could have sold his oil at the higher price. Petitioners further asserted in effect that the two-tier price system was discriminatory toward them, that it was unnecessarily and unreasonably burdensome to them, and that it singled out a group of property owners, including themselves, for especially onerous treatment not shared by all those similarly situated; and thus in its operation constituted a partial taking by physical appropriation for public purposes of their property and property rights—their shares of crude oil produced from the leases.

As in any Tucker Act case, two issues of fact were raised: First, whether there was in fact a taking by the government of Petitioners' property; and second, if there was such a taking, the value of the property taken.

The government sought dismissal claiming lack of jurisdiction and failure to state a meritorious claim; and in the alternative, moved for summary judgment, claiming absence of any issue of material fact.

The District Court determined that it had jurisdiction of the causes. The TECA reached the same conclusion. The District Court cited the basic rule that dismissal is improper "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim"; and pointed out that "it is clear that governmental regulation may under certain circumstances be so unreasonable to be deemed a taking which would require compensation." Finding itself unable to "conclude that the Petitioners are entitled to no relief under any state of facts which might be proved," the District Court denied the government's Motion to Dismiss.

As to Summary Judgment, the District Court pointed out that the government had belatedly filed an affidavit in support of its motion. (To which Petitioners have not been required to respond), which affidavit at most tended to prove a need for price regulation, but it "does not, however, speak to the issue of the discriminatory nature of the pricing scheme." The District Court noted: "Whether there has been a 'taking' typically involves a question of fact"; and accordingly denied the motion for Summary Judgment.

However, the District Court certified to the TECA as a "substantial constitutional question," pursuant to Section 211 (c) of the Economic Stabilization Act (See Appendix III) the question: "Have royalty owners whose crude oil is subject to ceiling price as determined under the regulations (10 C.F.R. §212.72-212.74) and who may not sell their crude oil at a price in excess of the ceiling price had their property taken for public use for which they may recover just compensation from the United States pursuant to the Fifth Amendment of the Constitution of the United States?"

Before the TECA, Petitioners contended that the question certified was not a "substantial constitutional issue" involving the "constitutional validity" of the Acts or regulations, and accordingly was now within the jurisdiction of the TECA through certification under §211 (c) of the Act.

Although the TECA might have had appellate jurisdiction of the cause at a proper stage, its appellate jurisdiction was not involved here. The Order denying dismissal and summary judgment was not appealable, and no appeal, interlocutory or otherwise, had been perfected by the government from the District Court's adverse ruling.

The TECA agreed that "should any state of facts fairly to be contemplated within the scope of the complaints indicate that there might have been an unconstitutional taking of plaintiff's property," a trial on the merits would be called for.

The TECA referred to its language in earlier TECA cases where the constitutional validity of the petroleum price regulations was attacked upon the ground that they "amount to a taking of private property without due process of law." In none of these cases was the fact of taking property in issue. However, the TECA concluded "that our previous rulings upholding the validity of the two-tier system and related regulations as involving no unconstitutional taking and as being otherwise valid control the present cases."

In this fashion, the TECA deprived Petitioners, and all others similarly situated, of their day in court; and of an opportunity to make their proof in support of the question whether their property was taken by government action, an issue admitted by all to be a question of fact.

The two-tier price control scheme was the work product of the now-defunct Cost of Living Council, first promulgated effective August 17, 1973 (6 C.F.R. §150.351 *et seq.*). In effect, it imposed a price ceiling of about $4.25 on about 60% of the domestic crude oil, exempting the balance from ceiling prices. The C.L.C. announced a policy to "continually monitor" crude oil ceiling prices, and an intent "to make periodic upward adjustments in the ceiling price toward the higher world prices for crude petroleum" (6 C.F.R. Part 150, Subpart L).

Crude oil price controls were continued under the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. §751 *et seq.*) by F.E.O. and later the F.E.A. The original authority for controls, the Economic Stabilization Act of 1970, expired in 1974. The 1973 act was intended to "prevent price gouging or price discrimination" caused by shortages and was accompanied by a Congressional admonition that ceiling prices be established in such fashion "that private property is not implicitly confiscated by the government." (House Report 93-531; Conference Report 93-628, U.S. Code Cong. & Adm. News, 93d Session, 1973, pp. 2582, 2688.)

New regulations later issued (38 Fed. Register, No. 245, 12-21-73, at p. 34985) repeated the policy of periodic ceiling price adjustments to keep pace with free market prices; and noted that when the original regulations came out the "spread" between the ceiling price for 60% of crude oil sales and the free market for the other 40% was about $1.00. Since then the price spread had risen to $2.00, with

some quotes over $4.00. Saying "spreads of this magnitude are potentially destabilizing and cannot long be maintained," the C.L.C. increased the crude oil ceiling price by $1.00.

Although the "spread" later increased to almost $9.00 by late 1975 (or 268%), no further adjustments were made in the ceiling price of crude oil.

The Energy Policy and Conservation Act of 1975 (P.L. 94-163) directed establishmer.. of ceiling prices resulting in "actual weighted average first sale price" of domestic crude oil not to exceed $7.66 per barrel. For the first time Congress specifically authorized "different ceiling prices for different classifications" of crude oil, so long as consistent with obtaining "optimum production of crude oil" (P.L. 94-163, Sec. 8 (b) (1)).

F.E.A. regulations adopted thereunder (Fed. Register, Vol. 41, No. 5, pp. 1564 *et seq.*) retained the ceiling price of $5.25 on sales of oil previously subject to price control (including Petitioners') and imposed a new ceiling price of $11.28 on oil previously uncontrolled. Thus, the "spread" between the two ceiling prices would be $6.03, or 215%. Since then the ceiling prices have been raised 3¢ and 7¢ to $5.28 and $11.35, respectively, signalling a policy of further increases in the price disparity.

REASONS FOR ALLOWING THE WRIT

(1) The TECA has decided a federal question in a way probably not in accord with applicable decisions of this Court.

This Court consistently has held that regulation by government imposing a burden on private property *can* amount to the taking of that property. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130; *Block* v. *Hirsh*, 236 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865.

It has held that while the federal government has power to fix prices (*Nebbia* v. *New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 63 S.Ct. 281, 88 L.Ed. 333; *Munn* v. *Illinois*, 94 U.S. 113, 24 L.Ed. 77), the price-fixing power is not absolute, and regulations cannot be "arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt." *In re Permian Basin Area Rate Case*, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312.

It has held that whether a particular regulatory action of government amounts to a taking of private property is "a question properly turning upon the particular circumstances of each case." *U. S.* v. *Central Eureka Mining Co.*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228; *U. S.* v. *Peewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809.

Here the TECA has held as a matter of law that the federal regulatory action involved does not result in the taking of property, thus depriving Petitioners of the right to a trial on the merits of issue purely on fact.

In the decision here the TECA has extended the doctrine of certain of its own previous decisions to a point in conflict with the above-cited decisions of this Court. In cases such as *Condor Operating Co.* v. *Sawhill* (TECA 1974), 514 F.2d 351, and *Cities Service Co.* v. *F.E.A.* (TECA 1975), 529 F.2d 1016, the TECA rejected a constitutional challenge to the validity of F.E.A. regulations on the ground that they amounted to a taking of property without due process of law." In none of those cases was the fact of taking in issue or decided.

By this case, the TECA's ruling on the constitutional issue is extended to deny Petitioners their day in court to prove, if they can, that operation of the regulation results in a partial taking of their property. The decision thus directly contravenes controlling decisions of this Court.

In *Regional Reorganization Act Cases,* 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320, this Court held that the Tucker Act is available as a remedy to persons who claim that governmental regulation has so burdened their property as to amount to a partial taking of it; and indeed, absent the availability of that remedy affords due process of law to the property owners affected, absent which the regulation would be unconstitutional.

The TECA here has decided in advance, and as an abstract principle of law, that the regulation involved here does not result in the taking of private property. By the decision here the TECA effectively has withdrawn the Tucker Act jurisdiction otherwise available to plaintiffs to seek just compensation for an alleged taking of their property. In the *Regional Reorganization Act Cases, supra,* this

Court conceded that Congress could not constitutionally deprive a property owner of his Tucker Act remedy; certainly a court cannot do so by judicial fiat.

(2) The TECA has assumed jurisdiction not granted to it by law.

The TECA is a court of limited jurisdiction, having only that jurisdiction granted by §211 of the Economic Stabilization Act as amended (See Appendix III). It has appellate jurisdiction of orders relating to validity of F.E.A. actions. (See §211 (a), (e) which was not invoked here.) The TECA (and this Court on review) has "exclusive jurisdiction to determine the constitutional validity of any provision" of the Act or regulations issued thereunder (See §211 (g)). Whenever a district court determines that "a substantial constitutional question exists" it is required to certify the question to the TECA for advance decision. Obviously, the typed "substantial constitutional question" appropriate for such certification is one involving the "constitutional validity" of the Act or regulations thereunder.

Although this Tucker Act case is "founded on the Constitution" (*U. S.* v. *Dow,* 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed. 1109; *U. S.* v. *Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789), it does not challenge the "constitutional validity of the Act or regulations thereunder. It is no part of a Tucker Act case to establish that the governmental action alleged to have resulted in the taking of private property was "constitutionally invalid."

The question certified was not a "substantial constitutional issue" involving "constitutional validity" of the Act or regulations cognizable by the TECA through the certi-

fication process; and the TECA had no jurisdiction thereunder, actual or pendent, to adjudicate fact questions or review the Order of the District Court denying dismissal and summary judgment.

(3) The federal question is of importance in the administration of justice.

(a) Although the claims of the three Petitioners here are relatively small, this litigation will determine the rights of hundreds of thousands of persons and corporations, large and small, who have sold crude oil at the federally-mandated price. The number of owners affected, and the value of property involved here far exceeds the number and investment of bondholders involved in the *Railroad Reorganization Act Cases, supra*. The TECA opinion cites colloquy (Appendix III, footnote 23) agreeing that if there has been a partial taking of Petitioners' property, there has been a similar taking of the property of all royalty owners and working interest owners of oil wells subject to selective F.E.A. price controls. Not quoted was further colloquy wherein the court expressed alarm that "this case could cost the government a hundred billion dollars"; and that "the government could not afford" for Petitioners to prevail. The Fifth Amendment's guaranty of "just compensation" for property taken is absolute; and those simple words should never be twisted to say that when the United States takes a little of its citizens' property, it has to pay for it; but when it takes a lot, it gets the property free.

(b) The two-tier crude oil price control scheme was not enacted by Congress; it is entirely a creature of an Administrative Agency. It represents the first time in our

nation's history that a scheme of price control has been promulgated affecting sales of a major raw material, whereby two lawful prices have been established for the sale of the same commodity under identical circumstances, one lawful price being over twice as much as the other. Any previous departure from uniformity in lawful price regulation has been approved only where there was shown a logical foundation for the categories to which different ceiling prices apply; the rates and categories being established, not by arbitrary administrative regulation; but by a federal regulatory agency, according to traditional rate-making principles, and after full hearing. See *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed. 2d 312; *F.P.C.* v. *Texaco, Inc.*, ... U.S. .... , 94 S.Ct. 2315.

Even the TECA has found the two-tier crude oil price scheme to be "inherently discriminatory as it affects the refiners of crude oil, thus sustaining an entitlement program" to equalize product cost among refiners. *Cities Service Co.* v. *F.E.A.* (TECA 1975), 529 F.2d 1016; *Pasco, Inc.* v. *F.E.A.* (TECA 1975), 525 F.2d 1391. If the dual price is discriminatory among the buyers of crude oil, certainly it is discriminatory among the sellers.

(4) The decision of the TECA is contrary to the intent and the policy of the Emergency Petroleum Allocation Act.

In enacting legislation authorizing ceiling prices on sales of crude oil at the wellhead, Congress clearly expressed its intent that "price discrimination" be avoided and that price control not result in "private property being confiscated" by the government. (House Report 93-531; Conference Report 93-628, U. S. Code Cong. & Adm. News, 93d Session, 1973, pp. 2582, 2688.)

The federal agency responsible for crude oil price control expressed an official policy of ultimate price parity; and that a "spread" in crude oil prices currently in effect of $2-$4 was intolerable. It requires a strong showing of public necessity to justify a spread in lawful prices for the same commodity in effect by virtue of federal mandate which at one point reached $9.00 (268%) and today exceeds $6.00 (215%). Invidious discrimination is inherent in a price control scheme whereby two prices are established for sales of the same commodity of general use under the same conditions, one price being up to 2½ times the other.

(5) Petitioners have been deprived of their day in court.

Whether private property of a citizen has been taken by government, or has been so burdened by government regulation as to amount to a taking, is a question of fact for decision after a trial on the merits. The District Court so held and the TECA embraced the principle. The District Court held that substantial fact issues remain for adjudication upon Petitioners' Tucker Act claim for just compensation for private property allegedly partially taken by federal regulatory action. Although the principal basis for the TECA decision was that the F.E.A. regulations involved as a matter of law do not amount to a taking of property, it is obliquely suggested therein that no substantial fact issues exist which would justify trial on the merits.

The TECA opinion as much as accuses the District Court of partiality toward Petitioners simply because it did not summarily dismiss their claims (Appendix I, pp. 6-7). Then by quoting small fragments apparently gleaned from a tape-recording made of oral argument, it seeks to

create an impression that Petitioners effectively conceded absence of bona fide issues of fact (Appendix I, footnote 24). It is not known whether a transcript of the argument exists, or whether this Court would deem it material to review the decision of the TECA. If so, a full review of the argument will clearly show that the TECA opinion utilizes tiny fragments of the argument, taken entirely out of context, in an effort to create an impression diametrically opposed to Petitioners' consistent position in this case.

Petitioners are well aware that they bear the burden of proving that federal regulatory action in fact resulted in a partial taking of their property. They accept the burden, and ask only for their day in court.

Whenever a citizen claims that his private property has been so burdened by federal regulatory action as to constitute a partial taking of that property, the Tucker Act affords him the remedy which the Constitution requires, to seek compensation for property shown to have been taken by federal regulatory action is essential to sustain its constitutionality. Whether such federal regulatory action actually results in the taking of private property, and the value of any such property taken, are issues of fact for trial on the merits of a cause filed pursuant to the Tucker Act. For any court to decide in advance and in the abstract, as the TECA did here, that a particular federal regulatory action did not result in the taking of private property, effectively deprives the Petitioners of their Tucker Act remedy; and deprives them of their day in court to prove, if they can, that their property was in fact taken, and its value. The judgment of the District Court afforded them

that right, and nothing more; the judgment of the TECA deprived them of that right, and their Tucker Act remedy, altogether. Accordingly, certiorari should be granted.

Respectfully submitted,

CHARLES NESBITT
620 Cravens Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

July, 1976

APPENDIX I

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-8

R. L. GRIFFIN, PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE.

No. 10-9

MAURICE LAMPE, PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE.

No. 10-10

ELBERT GRIFFIN, PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE.

Upon Certification by the United States District Court for the Eastern District of Oklahoma

(Nos. 75-84-C, 75-85-C, and 75-86-C)

Submitted April 27, 1976 Decided June 8, 1976

CHARLES NESBITT, Oklahoma City, Oklahoma, on the brief for the Plaintiff-Appellant.

LINDA PENCE, Attorney, Department of Justice, Washington, D. C., with whom Rex E. Lee, Assistant Attorney General and Stanley D. Rose, Department of Justice, Washington, D. C., were on the brief for the Defendant-Appellee.

Before CHRISTENSEN, VAN OOSTERHOUT and HASTINGS, Judges.

CHRISTENSEN, Judge.

These actions were brought in the district court by the above-named plaintiffs to obtain money judgments against the United States for the alleged taking of their property as a result of the operation of the two-tier pricing regulations on crude oil[1] administered by the Federal Energy Administration under the Emergency Petroleum Allocation Act (EPAA).[2]

Plaintiffs are non-operating (royalty) owners of part of the production from certain oil wells in Marshall County, Oklahoma. Each plaintiff alleged that by reason of the two-tier scheme he had been prohibited from selling his oil at a price above $5.25 per barrel while at the same time the crude oil produced from nearby leases, and elsewhere in

[1] In 1973 the Cost of Living Council, under its responsibility to develop and implement a program designed to carry out the provisions of the Economic Stabilization Act, P.L. 91-379 (Aug. 15, 1970) as amended, promulgated the two-tier price regulations governing the price structure at which producers could sell domestic crude oil. Thereafter, the system was continued by the Federal Energy Office and now is administered by the Federal Energy Administration pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 et seq. (Supp. 1973), as amended. The two-tier pricing system for crude oil was promulgated to minimize the inflationary impact of world-wide oil prices and to provide an incentive for increased domestic production of crude oil. As originally conceived it imposed a ceiling price of $5.25 per barrel on "old" oil and allowed new and released oil to be sold without regard to the ceiling price. The detailed discussions of the system in various aspects contained in Cities Service Co. v. FEA, 529 F.2d 1016 (TECA 1975); Pasco, Inc. v. FEA, 525 F.2d 1391 (TECA 1975); Consumers Union v. Sawhill, 525 F.2d 1068 (TECA1 975); and Nadar v. Sawhill, 514 F.2d 1064 (TECA 1975), are instructive in the present context but need not be repeated here.

[2] The EPAA was amended and extended by the Energy Policy and Conservation Act (EPCA), P.L. 94-163 (Dec. 22, 1975), 2 CCH Energy Management ¶ 10,850. The EPCA *inter alia* extends basic petroleum allocation authority contained in the EPAA and the new oil pricing provisions described in the EPCA for 40 months, will convert the oil price control and allocation authority to standby status at the end of that period and provides that the standby authority shall terminate five years after enactment.

Oklahoma and the United States, was permitted to be sold at the free market price of up to $14.00 per barrel. Each further alleged that but for this price control he could have sold his oil at the higher price.[3] Plaintiffs further asserted in effect that the two-tier price system was discriminatory toward them, but it was unnecessarily and unreasonably burdensome to them, that it singled out a group of property owners, including themselves, for especially onerous treatment not shared by all those similarly situated, and that in its operation it constituted a partial taking by physical appropriation for public purposes of plaintiffs' property and property rights—their shares of crude oil produced from the leases.

The United States moved for consolidation of the suits, which motion was granted; also for their dismissal on jurisdictional grounds, and for dismissal for failure to state claims on which relief could be granted or in the alternative for summary judgment on the merits. The district court held that it had jurisdiction by virtue of the Tucker Act[4]

[3] Regulations adopted under the Energy Policy and Conservation Act of 1975 temporarily rolled back the new oil price to $11.28, and there will be further adjustments as the guidelines established by the EPCA are pursued. 2 CCH Energy Management ¶ 12,589 at 12,997-3.

[4] 28 U.S.C. § 1346. "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort. . . ."

Cf. 28 U.S.C. § 1491. "The court of claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

and Section 210(a) of the Economic Stabilization Act.[5] It further concluded that neither dismissal on the pleadings nor summary judgment was warranted because there were unresolved issues of fact as to whether there had been a "taking" and because it could not be concluded that plaintiffs' claims were totally devoid of merit.[6] Finally, the district court certified to this court, pursuant to § 211(c) of the Economic Stabilization Act Amendments of 1971,[7] the following question:

> Have royalty owners, whose crude oil is subject to the ceiling price as determined under the regulations (10 C.F.R. §§ 212.72-212.74) and who may not sell their crude oil at a price in excess of the ceiling price, had their property taken for public use for which they may recover just compensation from the United States pursuant to the Fifth Amendment to the Constitution of the United States?

Although designated as "appellants" in the government's brief, plaintiffs disaffirm that posture except for the purposes of compliance with TECA Rule 16 (formerly Rule 31).[8] They say essentially that they were the prevail-

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[5] "Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ or injunction (subject to the limitations in section 211) and/or damages."

[6] Griffin v. United States, Nos. 75-84-C, 75-85-C, 75-86-C (E.D. Okla. Feb. 10, 1976).

[7] 12 U.S.C.A. § 1904 note, P.L. 92-210, incorporated by reference into the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754.

[8] (b) When a constitutional issue is certified by a district court the clerk will upon receipt thereof from the district court notify the plaintiff in the district court, who shall promptly pay the docket fee, after which the case will be placed on the docket. . . .

(d) The brief of the party who was plaintiff below shall be filed within 20 days after the certificate has been filed with the court.

ing party below;[9] that the lower court committed no error except by acceding to the suggestion of the United States that the constitutional issue be certified to this court; that "this is a simple Tucker Act case" involving only the fact questions of whether plaintiffs' properties were taken by the United States and the value of any property found to be so taken; and that, except for its apprehension of some constitutional obstacle, the district court was right in holding that a trial on the merits was required.

We are assured by plaintiffs that we need not be concerned with our prior decisions holding, or accepting such conclusion as the premise for related determinations, that the two-tier pricing system does not involve any unconstitutional taking.[10] They tell us that they do not contest the constitutionality of the FEA regulations; indeed, that they concede their constitutionality, and say that they necessarily must do so to be entitled to Tucker Act compensation, citing Tempel v. United States, 248 U.S. 121 (1918); United States v. Georgia Marble Co., 106 F.2d 955 (5th Cir. 1939), and Kirk v. United States, 451 F.2d 690 (10th Cir. 1971), *cert. denied*, 406 U.S. 963 (1972), to demonstrate that "any taking or destruction of property which is contrary to or unauthorized by Act of Congress would constitute a tortious injury to property for which compensation cannot be recovered under the Tucker Act." They say that their cases depend not upon the unconstitutionality of the regulation but upon factual problems which can be resolved only by trial and suggest that at trial they can show severe impact against them of what they characterize as discriminatory pricing. Thus plaintiffs conclude

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[9] Such designations have no significance in the present context except for identification purposes. We shall here refer to plaintiffs as such, rather than as appellants.

[10] Cities Service Co. v. FEA, 529 F.2d 1016 (TECA 1975), *supra;* Pasco, Inc. v. FEA, 525 F.2d 1391 (TECA 1975), *supra;* Consumers Union v. Sawhill, 525 F.2d 1068 (TECA 1975), *supra;* Nadar v. Sawhill, 514 F.2d 1064 (TECA 1975), *supra.*

that only fact issues are involved and that the district court's certification of the constitutional question was unjustified.

With the latter conclusion although not with the reasoning by which it was reached, the government agrees. It argues that certification was improvidently granted because no substantial constitutional issue exists, the constitutionality of the pricing system already having been sustained by this court. It fails to consider that, if this were so, remand without further determination on our part might be called for[11]—a disposition that would be welcomed by plaintiffs since it would remit them for trial to a district court apparently favorable to their position on the law. To the contrary, the government asks us to determine "that the district court erred in not granting its [the government's] motion to dismiss or in the alternative for summary judgment." And it argues on the basis of Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), that looking at the language of § 211 of the Stabilization Act and its legislative history, and considering the special nature of price controls, Congress intended to withdraw the Tucker Act remedy to parties in the position of plaintiffs—a proposition which if essential to counter plaintiffs' claims might itself raise a constitutional problem.[12]

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[11] Shapp v. Simon, 510 F.2d 379 (TECA 1975); National Petroleum Refiners Association v. Dunlop, 486 F.2d 1388 (TECA 1973). Cf. Condor Operating Co. v. Sawhill, 514 F.2d 351 (TECA), *cert. denied*, 421 U.S. 976 (1975), *supra*. See also. Carpenters 46 Cty. C. Bd. v. Construction Ind. St. Com., 525 F.2d 637 (TECA 1975).

[12] Before the district court the government had contended in the rail reorganization litigation that the law was constitutional because the Tucker Act afforded a remedy by way of just compensation for any private property taken in its execution. See Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n., 383 F.Supp. 510 (E.D. Pa.), *rev'd sub nom*, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), in which a three-judge District Court held the law unconstitutional because it found the Act negated any Tucker Act remedy for just compensation (419 U.S. at 119). The Supreme Court reversed, indicating that govern-

As if this welter of points and counterpoints were not enough, the government asks us to determine that the district court had no jurisdiction to entertain plaintiffs' suits in the first instance and thus that we have no appellate jurisdiction. The possible expanse of such a bar is indicated by its further argument that any right plaintiffs might have for monetary relief under the Tucker Act would be in effect cut off by the exclusivity of EPAA processes which afford to private parties against the government only the declaratory or injunctive relief provided by § 211 of the Economic Stabilization Act.

JURISDICTION

The government contends that § 210 does not authorize any type of suit against the government but only "private" actions for declaratory, injunctive or monetary relief and that § 211 is merely a limitation of that right and not a complementary grant of jurisdiction to the district courts. Air Products and Chemicals, Inc. v. United Gas Pipeline Co., 503 F.2d 1060, 1063 (TECA 1974); Brennan Petroleum Products Co., Inc. v. Pasco Petroleum Co., Inc., 373 F.Supp. 1312, 1313 (D Ariz. 1974); McGuire Shaft and Tunnel Corp. v. Local No. 1791, UMW, 475 F.2d 1209 (TECA), *cert. denied*, 412 U.S. 958 (1973), and Gas-A Tron of Arizona v. Union Oil, CCH Energy Management ¶ 9710, and certain legislative history[13] are cited in support of this contention.

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[12] [Continued]

mental regulation of private property may amount to a taking for which the 5th Amendment would require just compensation; that the Tucker Act must be deemed available as a remedy unless jurisdiction thereunder was affirmatively withdrawn; that the Rail Act contained no specific language withdrawing Tucker Act jurisdiction; and that since amendments by implication are disfavored, and a construction upholding constitutionality must be adopted if possible, there was no implied withdrawal of Tucker Act jurisdiction.

[13] "Section 210 provides a judicial method by which violators of regulations may be discovered and other would-be violators may be deterred.

Plaintiffs counter that there is no such limitation by the terms of the Act and that the restriction (of § 210 (a)) to "private suits" as suggested by the legislative history and dicta in some of our decisions must be deemed to relate only to the recovery of treble damages or other relief against persons renting property or selling goods or services pursuant to § 210(b). They also contend that § 211 operates in their case merely to waive the jurisdictional amount limitation of the Tucker Act, and that their entitlement to sue basically rests upon the broad language of § 210(a).

We think on the question of jurisdiction that plaintiffs are nearer the mark. But the positions of both parties fail to collate and reconcile sufficiently the two sections, which present a harmonious treatment of both jurisdiction of the respective courts and the right of aggrieved persons to bring actions for "legal wrongs" arising out of acts, practices, orders or regulations under EPAA. Assuming that plaintiffs are right in considering that § 211[14] removes

[13] [Continued]
This can be accomplished by authorizing a person suffering illegal wrong to bring a treble damage action against the violator."

"This action is intended to be brought by private persons against other private persons. The government will not bring such action nor be the subject of one. . . ." S. Rep. No. 92-507, 92nd Cong., 1st Sess. (1971), U.S. Code Cong. & Admin. News, 2283, 2291.

[14] § 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders, issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the cases shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

the jurisdictional amount bar that would otherwise apply to two of the claims, that section serves the more basic purpose also of establishing the overall jurisdiction of the courts involved, with implementing exclusivity and limitation provisions that must be read independently as well as in relation to § 210.[15] Subdivision (a) of the latter section deals with the specified right of those suffering "legal wrong" to sue, thus utilizing the jurisdiction afforded by

[14] [Continued]

(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals. . . . Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title.

. . . .

(d)(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. . . .

(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence. . . .

[15] § 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have over-

§ 211. And § 210(b) deals with a specified type of legal wrong. As so read, the two sections furnishing the basis of the involvement of the courts and the right to judicial relief on the part of affected private parties are consistent and comprehensive. They thus should be construed in accordance with their terms; and, again, we should not be quick to assume accidental or careless language on the part of the Congress where considerate purpose may be seen in the words it employed.[16]

The fact that "private suits" such as those brought by plaintiffs name as defendant, and seek monetary damages against, the United States no more renders them public suits than are claims brought by private individuals to recover damages against the United States, for example, under the Tort Claims Act. The characterization of such suits as something other than private suits contemplated by § 210(a) even though it is assumed they involve legal

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[15] [Continued]

charged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) An amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge; Provided, that where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

[16] Cf. Exxon Corp. v. FEA, 516 F.2d 1397 (TECA 1975).

wrong arising under EPAA, and precluding any action against the government pursuant to the latter section[17] seem difficult to justify.[18]

We believe that if or to the extent plaintiffs suffered legal wrong because of any taking of their property as a result of the two-tier oil pricing system, they would have the right to utilize the jurisdiction afforded in the district court by § 211 by bringing the type of action contemplated by § 210(a) for damages, there being no limitations in § 211 to the contrary.

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[17] Appellee's counsel at oral argument: ". . . We disagree with the district court. We do not think that § 210 provides jurisdiction for a direct action against the government. We disagree with appellants' contention that the Tucker Act provides jurisdiction.

"Question from the Court: On your jurisdiction issue, you wouldn't controvert the one under $10,000 would you?

"A. No, Sir.

"Q. So that at least the issues are raised as to one under $10,000; we can't get rid of that on jurisdiction?

"A. Right . . . The only jurisdictional statute for a direct action against the government is § 211 . . . The core issue is whether the two-tier pricing system constitutes a taking. . . ."

[18] Question from the Court during oral argument: "Let us assume here that the plaintiffs are correct in saying that there was a taking for which they were entitled to compensation somehow and somewhere. If your position of jurisdiction was right would they not be entirely without a remedy?—They couldn't go to the Court of Claims because it would be liability arising under the Petroleum Act; and you say they could not come . . . to the district court under the Petroleum Act because there is no way . . . that they can sue the government for money damages. . . .

"A. . . . Let's assume there's a compensable taking . . . the remedy is to come in and sue the Federal Energy Administration and have the two-tier pricing system declared unconstitutional—

"Q. No, no. The taking has already been accomplished. What you're suggesting is that they preclude further taking but what they want is compensation for past taking.

"A. In that case . . . the district court has exclusive jurisdiction and you have exclusive jurisdiction of the appeal . . . The remedy they have would not be for past damages but to declare the regulatory scheme itself unconstitutional."

CERTIFICATION

We have also concluded that the constitutional problem certified by the district court is not insubstantial. It is to be observed that heretofore we have not been directly confronted with the contention that the two-tier pricing system, as such and in its broad aspects, is unconstitutional by reason of invidious discrimination and as a taking of property contrary to the Fifth Amendment. Our consideration of the problem has been in relation to narrower aspects, such as the Old Oil Entitlement Program as applied to major refiners (*Cities Service*), as applied to small refiners (*Pasco*), the freeze of supplier-purchaser relationships (*Condor*), the statutory mandate for "regulating" new oil prices (*Consumers Union*), and the propriety of increasing the controlled price of old oil (*Nadar*). Notwithstanding our sustaining of the constitutionality of aspects of the program against general claims that it operated to take private property without just compensation contrary to the Fifth Amendment, plaintiffs' contentions in the context of the Tucker Act involve a new dimension and approach which as far as we have been able to determine is of first impression. Sheer novelty of a legal contention does not underwrite its substantiality, but it does militate against summary application of the doctrine of *stare decisis* and may commend the reading of smaller print as well as the caption.

While our attention has been called to no case where the award of damages based upon losses suffered as the result of the operation of a regulatory system within the police power have been finally approved, Mr. Justice Holmes' oft quoted language has been interpreted to suggest as much.[19] On the contrary, however, what he could

[19] ". . . [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

have had in mind was the propriety of the continued operation of the regulations rather than the remedy of compensation for an unauthorized taking. This applies also to other case cited by plaintiffs.[20] *Regional Rail Reorganization Cases* is in the context of possible compensation for a taking, although the facts are essentially different. Plaintiffs say that their cases involve such oppressive circumstances on the facts as to demonstrate that there has been a compensable taking within the reach of the statements relied upon. Whether there are facts within the scope of the complaint that could justify such a result despite prior decisions upholding the constitutionality of the regulations in question against other attacks, seems an inquiry worth confronting along the flank of the primary issue as we see it—the effect of our prior decisions upholding the validity of the two-tier system.

Nor has the argument relied upon by plaintiffs been presented heretofore in the context of the constitutional problem that would be confronted were a claim for Tucker Act damages accepted by a district court in the sense of preemption through the judicial review processes of the Economic Stabilization Act adopted in EPAA, but rejected because those provisions do not permit adjudication of such a claim, however meritorious. There are also important related concerns which go to the very viability of statutes and regulations designed to cope with the national energy crises or other emergencies through allocations or price controls. For these reasons we think it would be inappropriate to remand the case to the district court on the view that the constitutional question certified is frivolous or insubstantial.

[20] United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), and Block v. Hirsh, 256 U.S. 135 (1921]. Cf. Monarch Inc. Co. v. District of Columbia, 353 F. Supp. 1249 (D.D.C. 1973].

THE PROBLEM OF "A TAKING"

The district court, apart from the constitutional question that it perceived, denied the defendant's motion to dismiss or in the alternative for summary judgment, indicating its view that there could be facts shown by evidence to establish that plaintiffs' property had been taken contrary to constitutional guarantees.

We agree with appellants that should any state of facts fairly to be contemplated within the scope of the complaints indicate that there might have been an unconstitutional taking of plaintiffs' property, the question certified by the district court would have to be answered in the affirmative and the case remanded for trial on the merits.[21] If, on the contrary, it is apparent as a matter of law that under facts reasonably to be contemplated within the purview of the complaints the plaintiffs cannot prevail on the theory thereby revealed, the answer to the questions should be in the negative. We do not deal with mere abstractions in responding to certified constitutional issues, however worded, and we need not close our eyes to pendant considerations or consequences.[22]

THE ALLEGED FACT RESIDUALS FOR TRIAL

Aside from the mere characterization "discriminatory," we cannot find in the complaints any indication of circumstances that would place the plaintiffs in a position

[21] Material fact problems, as the trial court recognized, are not to be resolved on motions to dismiss or for summary judgment. Fed. R. Civ. P., rules 12(b)(6), 56.

[22] Section 211(b)(2)(c), *supra*, reads in part: ". . . Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of dispositon, which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition." See also Condor Operating Co. v Sawhill, 514 F.2d 351 (TECA), *cert. denied*, 421 U.S. 976 (1975), *supra*.

essentially different than that of the refiners attacking the entitlement program in *Cities Service* and *Pasco*. Counsel for appellants has been hard put to suggest any.[23] The price disparity under which the objectors must do business is the gist of the complaint in each case. Plaintiffs' brief refers vaguely to undisclosed "facts" which might be presented if a trial were to be had to demonstrate that there was an actual taking by the operation of the two-tier pricing program. The only type of evidence which plaintiffs' counsel suggested at oral argument as being within the scope of the complaints and beyond that of which we could take judicial notice, went to matters of policy, wisdom or overall effect of the regulations.[24]

[23] At the oral argument following colloquy between plaintiffs' counsel and the court occurred:

Q. You mention that the royalty owners are the "forgotten people." Is the situation of a royalty owner in character or kind essentially different than the situation of a well operator or a refiner with reference to the two-tier pricing system?

A. Slightly as to a well operator because the royalty owner pays no part of operating expense.

Q. Why would that differentiation put you in a different position? . . .

A. Because the royalty owner has no control over the maneuvering to get the higher price, and there is considerable of it . . . the drilling of additional wells and all of these things. . . .

Q. But if your argument is true with respect to royalty owners would it not also be correct as far as the operator is concerned?

A. Yes.

[24] ". . . [W]hat within the scope and purview of your pleading which is a limiting factor could you prove which would show that in your case there was a taking that couldn't be relied on as a matter of law in any case.

A. Give me just a moment to answer—

Q. Just tell us what you would prove within the purview of your pleadings at the trial that we couldn't take notice of now in determining the question as a matter of law.

A. We will be able to prove that first the two-tier system as it developed . . . with the widespread—it's a matter of magnitude—

We are convinced that the exploration by the district court of such matters would not only be futile but gratuitous, and could not alter the results of the cases. This would no doubt be so even though the district court might invest a substantial part of the months or even years the agency, with its extensive personnel, its administrative authority and responsibility and its presumed expertise has devoted to such problems.

THE DECISIVE PROBLEM OF LAW

The fatal flaw in plaintiffs' position is the assumption that the operation of the two-tier pricing system is lawful and constitutional and yet that it would give rise to an action for damages under the Tucker Act. The theory that their cases are comparable to actions in reverse condemnation is unsound. No implied contract can be constructed in the context of this case. If the operation of the regulations is constitutional, as we have held, be-

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[24] [Continued]

Q. We can take judicial notice of that . . . But tell me what peculiar proof you have which sets your case apart from all other cases.

A. . . . [W]e will prove that the two-tier pricing system in its practice discourages exploration and does not encourage it. The increased production of oil and gas it does not encourage. It rewards sloth and wastefulness in production rather than the reverse.

Q. That's a matter of policy. Are those the only type of things?

A. Permit me to disagree. Those are the matters that tend to show a taking. . . .

Q. Then you'll prove the disparity and then you'll prove the regulation is not wise because it discourages rather than encourages production. What else would you prove?

A. And we will prove that the purpose of the regulation is indeed to fight inflation but it does not apply equally to all persons similarly situated but a group of property owners including my clients are sought out to bear the brunt of a regulation.

Q. What could you prove that we could not take judicial notice of?

A. Little or nothing. . . . You know as well as I do . . . That is going to be the thrust of our testimony.

cause it does not involve a taking of property without just compensation but constitutes a legitimate exercise of the police power, the admission of this premise by the plaintiffs cannot convert the non-taking into a compensable taking.[25] No sufficient reasons appearing to the contrary, we conclude that our previous rulings upholding in principle the validity of the two-tier system and related regulations as involving no unconstitutional taking and as being otherwise valid control the present cases. And the broad point being so vital to the continuing statutory and regulatory structure,[26] we are constrained notwith-

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[25] Plaintiffs say that in such cases as Cities Service Co. v. FEA, 529 F.2d 1016 (TECA 1975), *supra*, Western States Meat Packers Ass'n, Inc. v. Dunlop, 482 F.2d 1401 (TECA 1973), and Local No. 11, IBEW v. Bolt, 481 F.2d 1392 (TECA 1973), "the courts in effect are saying that the fact that federal regulatory action results in a taking of private property does not render it invalid or unconstitutional . . . [because] if a person believes his property has been taken, he can always sue for its value." We do not agree. To the contrary, the cases cited held that the regulations there in question were valid because among other things they did not involve a taking and thus were constitutional. See also Condor Operating Company v. Sawhill, 514 F.2d 351 (TECA), *cert. denied*, 421 U.S. 976 (1975), *supra*, to the same effect.

[26] In both the EPAA (see H.R. Conf. Rep. No. 93-682, U.S. Code Cong. & Adm. News, 93d Cong., 1st Sess., p. 2688, 2702 (1973)), and the EPCA (see its § 401(a); also Senate Conf. Rep. No. 94-516, U.S. Code Cong. & Adm. News, 94th Cong., 1st Sess., p. 1956 (1975)); Congress accepted a continuation of the two-tier pricing system as an essential part of price controls until phased out as directed by the last-mentioned Act. It seems likely that the government is right in its argument that the power to regulate prices at all could not survive if plaintiffs' theory of compensation were to prevail. If those whose property values were diminished by price controls in the sense that plaintiffs' claim theirs have been must be awarded compensation for their "loss" of profits under an implied contract theory or otherwise, legislative attempts to control prices would be frustrated. In considering such "losses," particularly in connection with the oil allocation program, there seems no possibility of weighing the complex factors that would be involved in achieving any balance of the immediate detriments and overall benefit. Inbuilt into the two-tier system have been entitlements, and exceptions relief (see *e.g., Cities Service, supra, Pasco, supra*, and Amtel, Inc. v. FEA, _ F.2d _ (TECA No. 5-15, May 25, 1976)), for promoting competition and ameliorating in-

standing plaintiffs' somewhat oblique attack, to reiterate expressly in the broad context of the present cases that the two-tier oil pricing system is constitutional both as indicated by our prior rulings and because of the reasons set out in those rulings with reference to closely related problems.[27]

Accordingly, in response to the certified question, we hold in the context of these cases that royalty owners whose crude oil was subject to the ceiling price as determined under the regulations in question (10 C.F.R. §§ 212.72-212.74) and who may not sell their crude oil at a price in excess of the ceiling price have not had their property taken for public use for which they may recover compensation from the United States pursuant to the Fifth Amendment to the Constitution of the United States, or at all.

In view of this answer it is obvious and pendant in the same context[28] that plaintiffs' complaints should be

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[26] [Continued]
equities and hardships to the extent deemed practical and consistent with statutory objectives. The EPCA has established guidelines based upon a continuation of the two-tier system as controlled by a composite pricing formula and continuing overview by the Congress pending the phasing out of controls. In line with continuing responsibilities under the latest Act, the agency is pursuing additional administrative measures in an effort better to achieve the objectives of the program, as manifested by pending rule making, following two prior phases, in the "Third Stage of Implementation of the Energy Policy and Conservation Act" (see CCH Energy Guidelines ¶ 12,612). The current statutory treatment and such continuing efforts could be thrown into confusion if plaintiffs' contentions were ultimately approved. The wisdom, or lack of wisdom, of congressional policy within constitutional limitations is not our concern. But needless shadowing of that policy by any failure to address directly the issues necessarily before us would be unjustified.

[27] See particularly Cities Service Co. v. FEA, 529 F.2d 1016, 1025-29 (TECA 1975), *supra*; Pasco, Inc. v. FEA, 525 F.2d 1391 (TECA 1975); Condor Operating Co. v. Sawhill, 514 F.2d 351, 359-62 (TECA), *cert. denied*, 421 U.S. 976 (1975), *supra*. See also Western States Meat Packers Ass'n, Inc. v. Dunlop, 482 F.2d 1401, 1403-06 (TECA 1973), *supra*; Local No. 11, IBEW v. Bolt, 481 F.2d 1392, 1395-96 (TECA 1973).

[28] 15 U.S.C. § 211(b)(2)(c), *supra*.

dismissed for failure to state claims on which relief could be granted.

Remanded to the district court with directions to dismiss the complaints.

APPENDIX II

FILED
FEB 10 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

R. L. GRIFFIN, Plaintiff, -vs- UNITED STATES, Defendant.	)	No. 75-85-C
MAURICE LAMPE, Plaintiff, -vs- UNITED STATES, Defendant.	)	No. 75-84-C
ELBERT GRIFFIN, Plaintiff, -vs- UNITED STATES, Defendant.	)	No. 75-86-C

ORDER AND CERTIFICATION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

The plaintiffs have brought these three cases to recover compensation for property rights allegedly taken by the United States as a result of the two-tier price regulations on crude oil administered by the Federal Energy Administration (FEA) pursuant to the Emergency Petroleum

Allocation Act. 15 U.S.C. §751 et seq. The plaintiff in each of these cases is a royalty owner of an interest in the oil and gas and other minerals located in and under and produced from certain real property located in Marshall County, Oklahoma.

Each plaintiff alleges that from December 19, 1973, the ceiling price on royalty oil produced from his land has been fixed at $5.20 per barrel whereas the price on other crude oil produced in the immediate vicinity of his land and elsewhere in Oklahoma and in the United States, with the same intrinsic value and the same energy content as his oil is sold, under the law and regulations, at market price, which is approximately $12.00 per barrel. In paragraphs 1 and 10 of each complaint, it is alleged as follows:

> "1. This is an action against the United States founded upon the 5th Amendment to the United States Constitution, to receive just compensation for property taken by the United States for public purposes by physical appropriation, for which no compensation has been paid.
>
> "10. The actions of the defendant in preventing plaintiff from selling his crude oil at the current free market price, and forcing plaintiff to accept a price therefore substantially less than the free market price diminished the value of plaintiff's property, and constituted a partial taking, by physical appropriation for public purposes, without just compensation, of plaintiff's property and property rights in the portion of the crude oil produced from the above lands owned by plaintiff. The public purposes for which the property was taken were to enable United States citizens and the American consumers generally to enjoy the benefits of the energy produced from crude oil, including the oil owned by plaintiff, at a cost to them less than if the price were permitted to find its own level in a free market."

The defendant has filed a motion to dismiss or in the alternative for summary judgment in each of these cases and has filed a brief in support of its position. To the motions the plaintiffs have filed identical responsive briefs and the defendant has filed a supplemental brief in reply to the plaintiff's response. In view of the importance of the issues raised the Court set the matter and has heard extensive oral argument. Because of the similarity of the issues presented the three motions will be considered together.

The defendant seeks dismissal claiming lack of jurisdiction, failure to state a claim upon which relief can be granted, and lack of the existence of any issue of material fact therefore entitling the defendant to summary judgment under Rule 12(b) and Rule 56, Federal Rules of Civil Procedure. The defendant also argues that if the Court concludes that it does have jurisdiction and that the complaint does raise a substantial constitutional issue that the issue must be certified to the Temporary Emergency Court of Appeals. 12 U.S.C. §1904 (note 211(c)). Each of defendant's claims will be treated separately.

Jurisdiction.

The plaintiffs base jurisdiction of their claims on the Tucker Act (28 U.S.C. §1346(a)(2) and §210 of the 1971 Amendment to the Economic Stabilization Act (P. L. 92-210), 12 U.S.C. §1904 (note §210).

28 U.S.C. §1346(a)(2) provides:

> "The district courts shall have original jurisdiction, concurrent with the court of claims, of . . . (2) any other civil action of claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

The claims of both plaintiffs, R. L. Griffin and Maurice Lampe, are for more than $10,000, while plaintiff Elbert Griffin's claim is for less than $10,000. The plaintiffs claim that both the restrictions as to maximum jurisdictional amount in the Tucker Act and the minimum jurisdictional amount required by 28 U.S.C. §1331(a) have been removed as to actions under the Economic Stabilization Act, 12 U.S.C. §1904 note (§210(a)) which provides:

> "Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages."

The defendant does not contend that the jurisdictional amount is an issue but argues that section 210 applies *only* to actions against *private defendants* and does not apply to actions against the United States. Therefore, the defendant argues that unless the plaintiffs amend their complaint to properly allege jurisdiction under §211 their actions must be dismissed.

Section 211 of the Economic Stabilization Act provides in part:

> "The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy. . . ."

It is clear that one purpose of §210 is to create a remedy for private parties against private violators of the regulations. (See §210(b) and (c)). The legislative history supports this conclusion. Senate Report No. 92-507 states:

"Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against a violator.

"This action is intended to be brought by private persons against other private persons. The government will not bring such action nor be the subject of one.

"Any person suffering legal wrong because of any act or practice arising out of the operation of this act or because of any regulation or order issued under the act may bring an action in a federal district court, without regard to the amount in controversy, and may seek all appropriate relief including a declaratory judgment, an injunction (except as limited by the provisions of section 211 of this Act), or damages." S. Rep. No. 92-507 2 U.S. Code Cong. Admin. News, 92nd Cong., 1st Sess. 2291 (1971).

However, the legislative history relied upon by the defendant is not explicit and is ambiguous concerning whether this is the only purpose of the statute; it is far more ambiguous than the statute itself. Although subsections (b) and (c) of section 210 clearly relate to treble damage actions against private parties, subsection (a) is *not* so limited. Section 210(a) provides for suit in a district court of the United States by: "[*a*]*ny person* suffering *legal wrong* because of *any act or practice arising out of this title*, or any *order* or *regulation* issued pursuant thereto. . . ." (Emphasis added.)

The language of Section 210(a) simply does not restrict actions brought thereunder to those "brought by private persons against other private persons." This conclusion is further supported by the fact that section 210(a) is expressly made "subject to the limitations in section 211" as

to injunctive relief. The limitations referred to can only be the limitations in section 211 which limit the power of a district court or the Temporary Emergency Court of Appeals to enjoin or set aside regulations by agencies of the government. (See §211(d) and (e).

> "Since the statute is clearly written, and the 'injunction' issued in these cases was 'appropriate relief' specifically provided in §210(a), it is unnecessary to look to the legislative history to ascertain the intent of congress; . . ." *McGuire Shaft & Tunnel Corp.* v. *Local U. No. 1791, U.M.W.*, 475 F.2d 1209 at 1213 (TECA 1974).

Therefore, Congress must have contemplated that such actions could include an attack on agency regulations. Since an attack on agency regulations might require that the agency, the agency officials or the United States be made parties defendant, Congress must have intended section 210(a) to apply to actions against the United States as well as to private defendants. And the Temporary Emergency Court of Appeals has so construed it.

In *Air Products and Chemicals, Inc.* v. *United Gas Pipe Line Co.*, 503 F.2d 1060 (TECA 1974) that court had before it an action brought by plaintiff, Air Products and Chemicals, Inc., against the defendant, United Gas Pipe Line Company, under §210 of the Act, in which plaintiff sought to recover alleged overcharges from the defendant. The District Court had dismissed the action on the ground that "as private actions for relief under §210 of the Act they were premature" and because of the "[f]ailure to join the Cost of Living Council as an indispensable party. . . ." 503 F.2d at 1062. The Temporary Emergency Court of Appeals concluded that it was error to have dismissed the action but also concluded "that CLC should have been made a party to the actions below." 503 F.2d at 1062. The Court accordingly vacated the dismissal orders by the District Court and

remanded the cases "for appropriate proceedings on the merits *after the United States* or appropriate officer or agency *shall have been joined as a party.*" 503 F.2d at 1064 (Emphasis added.) This Court accordingly concludes that it does have jurisdiction under §210 and defendant's motion to dismiss for lack of jurisdiction is denied.

Failure to State a Claim Upon Which Relief Can Be Granted.

Each of the plaintiffs alleges that "[t]he actions of the defendant in preventing plaintiff from selling his crude oil at the current free market price, and forcing plaintiff to accept a price therefor substantially less than the free market price diminished the value of plaintiff's property, and constituted a partial taking, by physical appropriation for public purposes, without just compensation of plaintiff's property and property rights in the portion of the crude oil produced from the above lands owned by plaintiff." They admit Congress power to delegate authority to make such regulations and the FEA's power to regulate prices of crude oil, but they argue that such price regulation is a partial taking for which compensation is required by the 5th amendment. Plaintiffs further argue that they are in no way attacking the constitutionality or validity of the regulations and that they are not seeking to enjoin the enforcement of the regulations.

In their brief the plaintiffs state that the major issue in this case is "[w]hether the federal two-tier crude oil price control scheme constitutes reasonable regulation, or whether it amounts to a partial taking of plaintiff's property for which compensation must be paid. (Brief of plaintiffs, p. 14). They further argue that the two-tier pricing scheme is "not necessary in the public interest, is not rationally related to any legitimate regulatory purpose, and is so arbitrary and discriminatory as to amount to the partial taking of plaintiffs' property." (Brief of plaintiffs, p. 49). At oral argument plaintiffs, in response to the court's questions, made it unequivocally clear that although they vigorously assert that the regulations are arbitrary, unreasonable and discriminatory as applied to them, they nonetheless admit the constitutionality, validity and lawfulness of the regulations. Thus, they argue, they are not seeking a judgment declaring the regulations to be unlawful and void. Rather they seek just compensation for the partial taking of their property by the United States in applying to their royalty oil unreasonable, arbitrary and discriminatory regulations which force them to accept a price of $5.20 per barrel while allowing adjoining or nearby royalty owners to sell their royalty oil at approximately $12.00 per barrel.

The defendant argues that this Court should grant its motion to dismiss because recent decisions by the Temporary Emergency Court of Appeals have clearly demonstrated that plaintiffs' claims are neither substantial nor meritorious and hence should be dismissed for failure to state a claim upon which relief can be granted. In particular defendant relies on *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (TECA 1975), cert. denied 421 U.S. 976; *Union Oil Co.* v. *FEA*, ... F.Supp. .... (C. D. Cal 1974); *Exxon Corp.* v. *FEO*, ... F.Supp. .... (D.D.C. 1974); *Pasco, Inc.* v. *FEA*, ... F.2d ..... (TECA Slip Opinion No. 10-7, Oct. 14, 1975) and *Cities Service Co.* v. *FEA*, ... F.2d .... (TECA Slip Opinion No. DC-34, Dec. 31, 1975). Defendant says *Cities Service* is dispositive because the Court specifically stated "The two-tier pricing system was upheld by this court in a comprehensive opinion discussing the validity and effects of the system in *Consumers Union* v. *Sawhill*, [512 F.2d 1112, rehearing en banc (TECA 1975)]." *Cities Service* slip opinion at p. 3. The Court further stated that:

> "This court, in *Pasco*, found that the plaintiffs in that case had failed to establish that the Entitlements Program was arbitrary, capricious, or beyond the agency's

authority due to its failure to make a differentiation within the regulations between refiners producing their own crude oil and those refiners purchasing their refining needs." *Cities Service*, slip opinion, at p. 11.

Finally, on the question of whether there had been a "taking," the Court stated:

> "Claims for compensation from the government based upon the Fifth Amendment to the Constitution require a direct appropriation by the government of the claimant's property and do not encompass 'consequential injuries resulting from the exercise of lawful power.' *Knox* v. *Lee*, 79 U. S. 457, 551 (1870). In reviewing an order of the War Production Board which required the shut-down of non-essential gold mines due to the short supply of equipment and resources, the Supreme Court, in *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958), recognized that action under a regulation may so diminish the value of property as to constitute a taking, but stated: '[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation.' " *Cities Service*, slip opinion at p. 13.

The plaintiffs respond to defendant's argument by saying that none of these cases are in point because in each case the plaintiff is attacking the constitutionality, the legality or validity of the regulations. Here plaintiffs admit the constitutionality, legality and validity of the regulations, but because of what they say is a taking for public use of their property they are entitled to just compensation. They argue that this is the first and only case which has been brought by anyone seeking the relief which they ask. The defendant has cited no authority which disputes this contention.

Based on the record before the Court, the Court cannot conclude that the claims are so totally devoid of merit that

the Court should dismiss the action for failure to state a claim upon which relief can be granted.

> " 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved* in support of the claims." 2A *Moore's Federal Practice* Par. 12.08 (Emphasis by the author.)

The Court of Appeals for the Tenth Circuit has stated:

> "The law is clear that a complaint should not be so dismissed unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Gas-A-Car, Inc.* v. *American Petrofina, Inc.*, 484 F.2d 1102 at 1107 (10th Cir. 1973).

It is clear that governmental regulation may under certain circumstances be so unreasonable as to be deemed a taking which would require compensation. *Goldblatt* v. *Hemstead*, 369 U.S. 590 (1962); *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958). The Court cannot therefore conclude that the plaintiffs are entitled to no relief under any state of facts which might be proved in support of their claim. The motions to dismiss for failure to state a sufficient claim are denied.

Summary Judgment.

The defendant has submitted the affidavit of John Vernon in support of its motion for summary judgment. Said affidavit was attached to the defendant's brief in reply to

the plaintiffs' brief and the plaintiffs have not been requested to further respond to defendant's brief or affidavit. Since the Court has determined on the basis of the present record that summary judgment should not be granted, there is no need for further response by the plaintiffs at this time.

The affidavit submitted by the defendant is by John Vernon, who is the Deputy Assistant Administrator for Regulatory Programs, Federal Energy Administration. Mr. Vernon, by his affidavit, gives a brief history of the statutory authority of and the objectives of the Economic Stabilization Program from which came the crude oil price controls promulgated by the Cost of Living Council (CLC). Mr. Vernon further states the "Findings and Purpose" of the Emergency Petroleum Allocation Act from which was derived the authority of the Federal Energy Office which continued essentially unchanged the crude oil pricing scheme orignally promulgated by the CLC. The Federal Energy Administration received responsibility for administering the pricing program on June 27, 1974.

Based on the purpose of the relevant legislation and the emergencies facing the country, Mr. Vernon concludes that the two-tier pricing system is in fulfillment of the objectives of Congress and reflects a balance between the conflicting objectives of a need for increased domestic crude oil and the need for controlling inflation in prices of crude oil and refined petroleum products.

This affidavit is certainly supportive of the defendant's position that the two-tier pricing scheme was promulgated pursuant to lawful authority and that there was a need in this country for price regulations. It does not, however, speak to the issue of the discriminatory nature of the pricing scheme. Nor does the affidavit give detailed information regarding the steps taken or investigation done by the CLC, FEO or FEA in promulgating the regulations in question.

Whether there has been a "taking" typically involves a question of fact. The Supreme Court of the United States has stated it this way:

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155 at 168 (1958). See also *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962).

Since the precise facts are not known it is impossible to determine at this time that there are no genuine issues as to any material fact as required by Rule 56(c) Federal Rules of Civil Procedure. The motion for summary judgment is denied.

CERTIFICATION TO TEMPORARY EMERGENCY COURT OF APPEALS

The first paragraph in each plaintiff's complaint states:

> "1. This is an action against the United States, founded upon the 5th Amendment to the United States Constitution, to receive just compensation for property taken by the United States for public purposes by physical appropriation, for which no compensation has been paid."

12 U.S.C. §1904 (note §211(c) states:

> "(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition

which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition."

There is no question but that these actions are "commenced under this title." The plaintiffs specifically invoke jurisdiction under section 210. Neither is there any question but that plaintiffs are asserting entitlement to just compensation in each of these three cases because of the imposition upon them of the two-tier crude oil pricing structure. If they are entitled to just compensation it is by their own theory, based upon the Fifth Amendment. The Fifth Amendment provides in part:

> "No person shall . . . ; nor shall private property be taken for public use, without just compensation."

There is, therefore, in this Court's judgment, no question but that "a substantial constitutional issue exists" and the Court so finds. Certification is accordingly required by statute as to the constitutional issue involved. "Where substantial constitutional issues are raised it is for the Temporary Emergency Court of Appeals to determine the appropriate disposition. . . ." *National Petroleum Refiners Association* v. *Dunlop*, 486 F.2d 1388 at 1392 note 11 (TECA 1972).

Rule 31 of the Temporary Emergency Court of Appeals provides:

> "(a) When a district court certifies to this court a question involving a substantial constitutional issue, the certificate shall contain a statement of the nature of the cause and of the facts on which such issue arises. The certificate shall constitute (be in lieu of) a notice of appeal.
>
> "(b) When a constitutional issue is certified by a district court the clerk will upon receipt thereof from

> the district court notify the plaintiff in the district court, who shall promptly pay the docket fee, after which the case will be placed on the docket. If the plaintiff fails to pay the fee within 7 days, unless exempt or relieved from its payment, the proceeding will be dismissed.
>
> "(c) After docketing, the certificate shall be submitted to the Chief Judge for disposition pursuant to Rule 24 and §211(c) of P. L. 92-210 for a preliminary examination to determine whether the certificate will be dismissed, or whether other disposition shall be made."

This Court has heretofore in this order set forth "a statement of the nature of the cause and of the facts on which such issue arises." The constitutional issue certified to the Temporary Emergency Court of Appeals is as follows:

> "HAVE ROYALTY OWNERS, WHOSE CRUDE OIL IS SUBJECT TO THE CEILING PRICE AS DETERMINED UNDER THE REGULATIONS (10 C.F.R. §212.72-212.74) AND WHO MAY NOT SELL THEIR CRUDE OIL AT A PRICE IN EXCESS OF THE CEILING PRICE HAD THEIR PROPERTY TAKEN FOR PUBLIC USE FOR WHICH THEY MAY RECOVER JUST COMPENSATION FROM THE UNITED STATES PURSUANT TO THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?"

IT IS SO ORDERED this 10th day of February, 1976.

s/ Joseph W. Morris
United States District Judge

APPENDIX III

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

(a) United States Constitution, Amendment V.

". . . nor shall private property be taken for public use, without just compensation."

(b) 28 U.S.C. §1346 (a).

"The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . ."

(c) Economic Stabilization Act of 1970, Amendments of 1971, 12 U.S.C.A. 1904 note, P.L. 92-210, 85 Stat. 743:

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"§ 211. Judicial review.

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than

a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a

person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment

affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or

order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title."

CERTIFICATE OF MAILING

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were this date mailed, postage prepaid, to:

Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that the following who are all of the counsel for the United States, required by law to be served in the above case, were this day jointly mailed three copies of the foregoing Petition for Writ of Certiorari, postage prepaid:

Rex E. Lee
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Linda Pence
Economic Litigation Section
Civil Division, Department of Justice
Washington, D.C. 20530

Michael Rose
Economic Litigation Section
Civil Division, Department of Justice
Washington, D.C. 20530

DATED this ..... day of July, 1976.

.....
Charles Nesbitt

Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

No. 76-2

In the Supreme Court of the United States

OCTOBER TERM, 1976

R. L. GRIFFIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

LEONARD SCHAITMAN,
LINDA PENCE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. I) is reported at 537 F. 2d 1130. The order of the district court (Pet. App. II) is not reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on June 8, 1976. The petition for a writ of certiorari was filed on July 6, 1976.

The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. (Supp. V) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stablization Act of 1970, as added, 85 Stat. 750, 12 U.S.C. (Supp. V) 1904 note, and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations under the Emergency Petroleum Allocation Act of 1973 that limit the price at which certain crude oil may be sold amount to a taking of petitioners' property, without just compensation, in violation of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 629, as amended, 15 U.S.C. (Supp. V) 753(a), provides:

> Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

The other relevant statutes and regulations are set forth at Pet. App. III, pp. 34-40.

STATEMENT

In response to the nationwide petroleum shortages caused in part by inadequate domestic production and the Arab oil embargo, in the fall of 1973 Congress enacted the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act"), 87 Stat. 627, 15 U.S.C. (Supp. V) 751 *et seq.* The shortages were found to have

created "severe economic dislocations and hardships," and Congress directed that the authority granted under the Allocation Act "shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on * * * the domestic economy" (Section 2, 15 U.S.C. (Supp. V) 751).

Section 4(a) of the Allocation Act, 15 U.S.C. (Supp. V) 753(a), requires the President to promulgate regulations "providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts * * * and at prices specified in * * * such regulation[s]."

To minimize the inflationary impact of rising world oil prices and to provide the necessary incentive for increased domestic production of petroleum, the so-called "two-tier" pricing system for crude oil was established.[1] Under this system, "old" oil, that is, the amount of domestic crude oil extracted from properties up to their 1972 base production control levels, cannot be sold at prices in excess of a ceiling level of approximately $5.25 per barrel, which is substantially below the open market price. "New" crude oil, which is the amount of domestic

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[1]The two-tier pricing system originally was established by the Cost of Living Council as a part of Phase IV of the Economic Stabilization Program, 6 C.F.R. Part 150, Subpart L (1974), 38 Fed. Reg. 22536. Pursuant to Section 5(b) of the Allocation Act, 15 U.S.C. (Supp. V) 754(b), the President established the Federal Energy Office ("FEO") and delegated to it all his authority under that Act. Executive Order 11748, 38 Fed. Reg. 33575. The FEO subsequently adopted the two-tier system without substantial change, 10 C.F.R. Part 212, Subpart D (1974), 39 Fed. Reg. 1924, as Congress had contemplated it would. See H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. (1973). FEO became the Federal Energy Administration ("FEA") pursuant to the Federal Energy Administration Act of 1974, 88 Stat. 96, 15 U.S.C. (Supp. V) 761 *et seq.*

crude oil extracted from a property in excess of its 1972 level, until recently was permitted to be sold in the open market, where it was subject to foreign competition but still commanded a substantial premium over the price of old oil.[2] The validity of the two-tier pricing system under the Act was upheld in *Consumers Union of the United States, Inc. v. Sawhill*, 525 F. 2d 1068 (T.E.C.A.) (*en banc*), vacating 512 F. 2d 1112.

Petitioners, royalty owners of interests in "old" crude oil, brought separate actions against the United States in the United States District Court for the Eastern District of Oklahoma, claiming that the restrictions on the prices at which the oil in which they have interests could be sold under the two-tier pricing system amounted to a taking of their property without just compensation, in violation of the Fifth Amendment. The district court ordered the complaints consolidated and, having determined that a substantial constitutional question was presented, certified the case to the Temporary Emergency Court of Appeals ("TECA").[3]

The TECA ruled that the case did present a substantial constitutional issue that had not previously been passed

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[2]Title IV of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 941, amended various provisions of the Allocation Act, and was itself amended by the Energy Conservation and Production Act of 1976, Pub. L. 94-385, 90 Stat. 1125. None of these amendments is immediately relevant to any of the issues raised here.

[3]Section 211(c) of the Economic Stabilization Act, 12 U.S.C. (Supp. V) 1904 note, incorporated by reference into Section 5(a)(1) of the Allocation Act, 15 U.S.C. (Supp. V) 754(a)(1), provides that the district court shall certify to the TECA any case arising under the Allocation Act in which a "substantial constitutional issue exists." The district court ruled (Pet. App. II, pp. 31-33) that such an issue was posed in this case by petitioners' reliance on the Takings Clause of the Fifth Amendment.

upon (Pet. App. I, pp. 12-13), but it resolved that question against petitioners on the authority of its earlier decisions upholding other aspects of the petroleum allocation regulations against similar takings claims and remanded the case to the district court with instructions to dismiss the complaints (Pet. App. I, pp. 16-19).

ARGUMENT

The TECA correctly ruled that the two-tier pricing system does not amount to a taking of petitioners' property, and further review is unwarranted.

1. To achieve the Allocation Act's goals of dampening the inflationary impact of rising world oil prices while encouraging increased domestic production, the two-tier system incidentally restricts the profit that petitioners can realize on the sale of their crude oil. That system, however, reflects the proper exercise of lawful regulatory authority conferred by the Act. *Consumers Union of the United States, Inc.* v. *Sawhill, supra; Cities Service Company* v. *Federal Energy Administration*, 529 F. 2d 1016, 1020 (T.E.C.A.), certiorari denied, June 21, 1976 (No. 75-1230). Consequential injuries to petitioners resulting therefrom accordingly are not compensable under the Fifth Amendment. See *Knox* v. *Lee*, 12 Wall. 457, 551; *Block* v. *Hirsh*, 256 U.S. 135; *United States* v. *Central Eureka Mining Company*, 357 U.S. 155; *Goldblatt* v. *Hempstead*, 369 U.S. 590.

The constitutionality of petroleum allocation regulations[4] that have the incidental effect of limiting the price at which a refiner may dispose of its crude oil was established in *Condor Operating Company* v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421

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[4]The "December 1 Rule," 10 C.F.R. 211.63(a).

U.S. 976. Other regulations,[5] restricting the ability of refiners with disproportionate access to "old" oil from refining that lower priced oil at will and thereby gaining a larger market share or higher profit margins, were sustained as valid under the Act in *Pasco, Inc.* v. *Federal Energy Administration,* 525 F. 2d 1391 (T.E.C.A.), and were later upheld against the claim that they resulted in a taking of the affected refiners' property without just compensation. *Cities Service Company* v. *Federal Energy Administration, supra.* This case follows *a fortiori* from those decisions. As the court below correctly held (Pet. App. I, pp. 17-18; footnotes omitted):

> [O]ur previous rulings upholding in principle the validity of the two-tier system and related regulations as involving no unconstitutional taking and as being otherwise valid control the present cases. * * * [W]e * * * reiterate expressly in the broad context of the present cases that the two-tier pricing system is constitutional both as indicated by our prior rulings and because of the reasons set out in those rulings with reference to closely related problems.

2. Petitioners argue (Pet. 11-12) that the district court should not have certified the case to the TECA because it presented no substantial constitutional issue and that therefore the TECA lacked jurisdiction to consider it.[6] Petitioners premise their argument on the belief that they can at once concede the constitutionality of the two-tier system yet challenge it under the Takings Clause. This premise is unsound, as the court

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[5]The Cost Equalization Program, 10 C.F.R. 211.67.

[6]See note 3, *supra.*

below correctly perceived (Pet. App. I, pp. 16-17; footnote omitted):

> The fatal flaw in [petitioners'] position is the assumption that the operation of the two-tier pricing system is lawful and constitutional and yet that it would give rise to an action for damages under the Tucker Act.* * * If the operation of the regulations is constitutional, as we have held, because it does not involve a taking of property without just compensation, but constitutes a legitimate exercise of the police power, the admission of this premise by the [petitioners] cannot convert the non-taking into a compensable taking.

Moreover, petitioners appear to concede (Pet. 6) that, had the case not been certified, the TECA would nonetheless have had appellate jurisdiction over it following its dispostion in due course by the district court. Petitioners do not claim (and in our view could not plausibly claim) that the outcome of the case would have been different had the TECA exercised its appellate jurisdiction later rather than sooner, and thus even if that court's review was premature no issue warranting this Court's review is presented.

3. Without suggesting what facts they might have adduced that could conceivably have altered the decision below, petitioners argue (Pet. 14-16) that, by deciding as a matter of law that the two-tier pricing system does not take their property within the meaning of the Fifth Amendment, the TECA has erroneously deprived them of their right to a jury trial on the same issue. The court below correctly analyzed this issue, however, when it said (Pet. App. I, p. 14) that a jury trial was unnecessary "[i]f * * * it is apparent as a matter of law that under facts reasonably * * * contemplated

within the purview of the complaints the [petitioners] cannot prevail on the theory thereby revealed." The complaints made allegations essentially similar to those in *Cities Service* and *Pasco* (see Pet. App. I, pp. 14-15), and at oral argument petitioners' counsel was unable to say what facts (other than those of which the TECA could take judicial notice) might be proved at a trial that would distinguish this case from those cases (*id.* at 15). In short, since petitioners failed to show that any facts material to disposition of their complaints were in dispute, they were not entitled to a jury trial and the TECA properly treated the takings issue as a threshold legal question that, when resolved against petitioners, ended the case.

4. Petitioners also assert (Pet. 10-11) that the decision below is in error because it "effectively has withdrawn the Tucker Act jurisdiction otherwise available to plaintiffs to seek just compensation for an alleged taking of their property."

This case, however, presents no occasion to consider what effect, if any, enactment of the Allocation Act has had upon the jurisdiction and remedies provided for under the Tucker Act (28 U.S.C. 1346 and 1491). The decision below cannot be said to have passed upon this issue (see, *e.g.*, Pet. App. I, p. 12). More importantly, since, for the reasons stated above, the two-tier pricing system does not constitute a compensable taking under the Fifth Amendment, petitioners would not be entitled to any remedy under the Tucker Act even assuming that jurisdiction under that Act has not been withdrawn by the Allocation Act. Thus there is no reason to consider the relationship between the two Acts in the context of this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

LEONARD SCHAITMAN,
LINDA PENCE,
Attorneys.

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